

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1278

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A/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

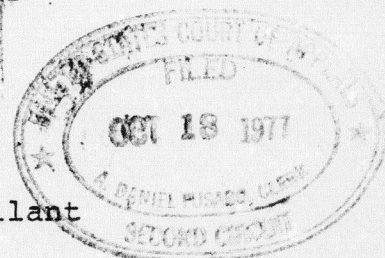
UNITED STATES OF AMERICA,

Appellant

v.

THE MERCHANT DIAMOND GROUP, INC.,

Appellee



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES

RICHARD J. ARCARA,
United States Attorney,
Western District of New York.

LLOYD GEORGE PARRY,
Special Attorney,
Buffalo Strike Force.

SHIRLEY BACCUS-LOBEL,
HOWARD WEINTRAUB,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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REPLY BRIEF FOR THE UNITED STATES

This reply brief responds to appellee's claim that the decision below is not a final determination that the seized property is inadmissible evidence in any future hearing or trial.

STATEMENT

As we point out in our opening brief, on June 8, 1977, appellee filed a motion pursuant to Rule 41(e), F.R.Crim.Proc. for "the return of property and suppression of evidence." Appellee claimed that the government's seizure of its property pursuant to court authorized warrants and orders was unlawful because the

supporting affidavit contained insufficient probable cause to substantiate the searches and seizures. After conducting a hearing, the court concluded that the affidavit contained "a number of material inaccuracies" (App. 18), that the government failed "to refute [appellee's] evidence" (id. at 19), and failed to "establish the probable cause needed to uphold the search and seizure under Rule 41(e)" (App. 18). The court therefore ordered the property returned to appellee.

ARGUMENT

AN ORDER RETURNING PROPERTY UNDER RULE 41(e),
F.R.CRIM.PROC. ACTS AS A FINAL DETERMINATION
OF THE ADMISSIBILITY OF THE PROPERTY IN ANY
FUTURE HEARING OR TRIAL

1. Appellee's assertion that its motion was "merely an application under Rule 41(e) for the return of ... property [claimed to be] held pursuant to a search and seizure warrant based upon incorrect information" (Appellee's Brief at 10) and that the "return of the property to [appellee] in no way impedes the Government's ability to bring on its criminal case" (id. at 24) fails to take notice of the plain language of Rule 41(e), F.R.Crim.Proc. cited in our opening brief at pages 1 and 2. On its face, the Rule clearly provides that a motion for return of property can only be granted if there is a finding by the district court that the movant is "aggrieved by an unlawful search and seizure" and "is entitled to lawful possession of the property which was illegally seized" (emphasis added). Significantly, Rule 41(e) expressly provides that "[i]f the motion is granted

the property shall be restored and it shall not be admissible in evidence at any hearing or trial" (emphasis added). Moreover, appellee fails to address itself to the en banc decision of the Sixth Circuit in United States v. Giacalone, 541 F.2d 508 (6th Cir. 1976) cited in our brief at page 15, where the court held that the granting of a motion for return of property under Rule 41(e) acts as a res judicata determination in future litigation of the admissibility of the seized property.

The cases cited by appellee do not support its claim that Judge Curtin's ruling will not affectively prevent the evidentiary use of the returned property. Appellee's reliance on DiBella v. United States, 369 U.S. 121 (1962) is misplaced. DiBella concerned only the question of appealability of preindictment motions for suppression of evidence and the return of property unlawfully seized. There the Supreme Court held that a ruling on a preindictment motion for suppression was an unappealable interlocutory order because "the motion presents an issue that is involved in and will be part of a criminal prosecution in process at the time the order is issued" (Id. at 127). The Court merely concluded that "[o]nly if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse against the movant can the proceedings be regarded as independent and therefore the basis for a final judgment essential to the invocation of jurisdiction on appeal (Id. at 131-132).

Furthermore, Lord v. Kelley, 223 F.Supp. 688 (D. Mass. 1963),

appeal dismissed, 334 F.2d 742 (1st Cir. 1964), cert. den., 379 U.S. 961 and Richey v. Smith, 515 F.2d 1239 (5th Cir. 1975) upon which appellee relies also support the conclusion that a motion for return of property acts as a final determination of suppression. In Lord v. Kelley, Judge Wyzanski ordered the return of a taxpayer's records because of a finding of an unlawful seizure. However, the court determined that suppression of the records in a future trial was not warranted in that instance because the I.R.S. agent who recieved the records "knew of [them] before they were delivered to him" and "[m]ore significantly, [the agent] had already signed a summons covering those records." Lord v. Kelley, supra, 223 F.Supp. at 690. Thus, if the agent "had *** waited patiently, the records, no doubt, would have been produced in response either to the administrative summons or to a judicial order ***" (ibid). Therefore, suppression was not necessary in Kelley only because there was an independent basis for obtaining the records. Similarly, the court in Richey v. Smith, supra, 515 F.2d at 1245, concluded that a Rule 41(e) motion for return of property operates "also as an order suppressing the use of the evidence." Relying on Lord v. Kelley, supra, however, the court determined that an equitable action for the return of property made "prior to any suggestion of criminal proceedings *** would not necessarily entail suppression for the purposes of further court proceedings." Id.^{1/}

1/ The Richey decision apparently indicates that equitable relief in the form of a return of property to avoid an irreparable injury is available even though the evidence was lawfully siezed. Indeed,

(FOOTNOTE CONT'D)

2. We note, moreover, that there is no record support for appellee's contention that the district court ordered the property returned under its inherent equitable jurisdiction rather than pursuant to Rule 41(e). Judge Curtin's opinion does not indicate that he balanced equitable factors and considerations in formulating his decision. It is clear that the property was returned under Rule 41(e) and that the jurisdictional predicate for invoking the Rule -- an unlawful search and seizure -- was found to exist only by applying an impermissible standard of review in determining the sufficiency of the probable cause of an affidavit necessary to support a search warrant.^{2/} Furthermore, the absence of an

1/ (CONT'D) this much would appear to follow the fact that equitable relief is -- as the Richey court observed (515 F.2d at 1243-1244) -- unavailable where an adequate remedy at law exists for the redress of the grievance. Where there has been an unlawful search and seizure, Rule 41(e) provides an adequate remedy to an aggrieved party. In this case, however, it is plain that the court below resolved appellee's motion pursuant to Rule 41(e), finding -- albeit incorrectly, in our view -- that the warrant was not supported by probable cause.

2/ As we show in our main brief, a proper application of the governing law established by this Court demonstrates that the search and seizure conducted in the instant case was lawful. As discussed in our opening brief at pages 17-20, the decisions of this Court do not support the propriety of a preliminary trial on the merits for the purpose of assessing the validity of honest representations which establish probable cause for a search warrant. Appellee's unsupported contention that these cases "are not appropriate for consideration in the case at bar [because they] deal with post-indictment motions for the return of property and suppression of evidence" (Appellee's Brief at 19, n. 4) is without merit. A determination whether a facially valid affidavit can be defeated is dependent solely on whether the affiant either purposefully lied to the magistrate or negligently presented a falsehood of material importance to the finding of probable cause. Appellee's argument -- in effect that the existence of probable cause is predicated on the timing of the filing of a motion for return of property -- is illogical. In this respect, we note that Judge Haight in reconsidering his earlier denial of

(FOOTNOTE CONT'D)

equitable approach is illustrated by the closing paragraph of the court's opinion wherein it refused to consider the interests of customers of appellee who may have been defrauded as a result of appellee's business practices (App. 19; See App. 542-552). Compare United States v. Birrell, 276 F.Supp. 798, 814-815 (S.D. N.Y. 1967).

Therefore, contrary to appellee's suggestion, Judge Curtin's order returning appellee's property under Rule 41(e) will preclude the government from making any use of it in its investigation or at trial.

2/ (CONT'D) the movant's motion for return of property (see Addendum to Government's Brief) held that the applicable standard for impeachment of a facially valid search warrant affidavit was that advanced by this Court in Kahn v. Flood, 550 F.2d 784 (2nd Cir. 1977) and its earlier decisions and by the Seventh Circuit in United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973). In defining the scope of the hearing Judge Haight held:

Carmichael arose within the context of a post-indictment motion to suppress evidence, in contrast to the present preindictment motion for return of property. While reported cases in the former category are far more frequent, no basis for applying different standards between them has been suggested by counsel or is apparent to the Court. Accordingly Carmichael and like cases in this Circuit may properly be considered.

(Memorandum Opinion and Order at 1, footnote omitted). A copy of Judge Haight's opinion upon reconsideration is attached as an Addendum to this brief.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the government's opening brief, it is respectfully submitted that the order of the district court returning appellee's property under Rule 41(e), F.R.Crim.Proc., should be reversed.

LLOYD GEORGE PARRY,
Special Attorney,
Buffalo Strike Force.

RICHARD J. ARCARA,
United States Attorney,
Western District of New York.

SHIRLEY BACCUS-LOBEL,
HOWARD WEINTRAUB,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of October,
1977, a copy of the foregoing Brief was served by mail on
counsel for appellee:

Warren S. Radler, Esquire
Saperston, Day & Radler
Liberty Bank Building
Buffalo, New York 14202


HOWARD WEINTRAUB
Attorney for the United States
Appellate Section
Criminal Division
Department of Justice
Washington, D.C. 20530.

ADDENDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
IN THE MATTER OF A SEARCH WARRANT :
FOR THE PREMISES OF LONDON MERCHANTS :
INC., 488 MADISON AVENUE, 5th FLOOR, :
NEW YORK, NEW YORK AND FOR SAFE :
DEPOSIT BOXES F-241, F-242, 52-450, :
52-466 LOCATED IN THE CHEMICAL BANK, :
488 MADISON AVENUE, NEW YORK, NEW YORK. :
----- x

M 18-65-CSH

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

London Merchants, Inc. ("LM") moves for reconsideration of this Court's opinion and order of July 29, 1977, denying LM's motion under Rule 41(e), F.R.Cr.P.,¹ for the return of property seized under warrant. At the Court's request, the parties have submitted additional authorities and arguments.

LM presses its demand for a hearing. Primary reliance is placed upon United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973), and Chief Judge Curtin's decision in United States v. Merchant Diamond Group, Inc., W.D.N.Y., Misc. Crim. No. 214 (decided June 27, 1977; appeal pending).

Carmichael arose within the context of a post-indictment motion to suppress evidence, in contrast to the present pre-indictment² motion for return of property. While reported cases in the former category are far more frequent, no basis for applying different standards between them has been suggested by counsel or is apparent to the Court. Accordingly Carmichael and like cases in this Circuit may properly be considered.

LM relies upon this statement in Carmichael:

"We now hold that a defendant is entitled to a hearing which delves below the surface of a facially sufficient affidavit if he has made an initial showing of either of the following: (1) any misrepresentation by the government agent of a material fact, or (2) an intentional misrepresentation by the government agent, whether or not material." 489 F.2d at 988.

Among other authorities for this proposition, the Carmichael court cited United States v. Dunnings, 425 F.2d 836 (2d Cir. 1969), cert. den., 397 U.S. 1002, in which the Second Circuit said:

"We have intimated that circumstances might arise where a hearing with respect to the truth of a legally sufficient affidavit should be granted. United States v. Freeman, 358 F.2d 459, 463 n. 4 (2 Cir.), cert. denied, 385 U.S. 882, 87 S.Ct. 168, 17 L.Ed.2d 109 (1966); United States v. Suarez, 380 F.2d 713, 715-716 (2 Cir. 1967); United States v. Ramos, *supra*, 380 F.2d at 720. But, for reasons well indicated by Judge Frankel in United States v. Halsey, 257 F.Supp. 1002, 1004-1006 (S.D.N.Y. 1966), that should be done only when there has been an initial showing of falsehood or other imposition on the magistrate." 425 F.2d at 840.

In the case at bar, LM relies upon three "initial showings of falsehoods":

(1) ¶4(c) of Postal Inspector Johnson's affidavit, underlying the warrant, refers to telephone calls intercepted by the Royal Canadian Mounted Police ("RCMP") "wherein London Merchants, Inc. salesmen" made alleged misrepresentations. LM contends that, from a reading of the affidavit alone, it is obvious that the reference should have been to London House, Ltd.

of Toronto, rather than LM. The Government does not quarrel with that contention; it ascribes the discrepancy to typographical error.

(2) ¶4(f) of the Johnson affidavit states that "in the vast majority of instances where customers have sought" to return their diamonds for a refund, "London Merchants, Inc." has failed to provide a refund. LM, on this application, characterizes this statement as "plainly false"; however, the only support offered for that characterization is counsel's assertion that "my own investigation of the facts demonstrates that this is a false statement." Shaw affidavit of July, 1977, ¶9. False the statement may prove to be, if counsel's investigation reflects the facts; but surely it is not "plainly false", in the sense of error appearing on the face of the affidavit.

(3) ¶4(d) of the affidavit quotes a diamond expert named Arend, who advised the RCMP on market values in a manner said to be inconsistent with representations made by LM to potential customers. LM attacks this market information as "plainly false", based upon counsel's consultation with a "recognized expert in diamonds", and also upon Judge Curtin's findings, based on Arend's testimony, during a hearing before him in the Merchant Diamond Group case, supra.

The Government denies that the factual assertions in these last two sub-paragraphs are in any way inaccurate.

LM presses, under Carmichael, for a hearing "which delves below the surface of a facially sufficient affidavit." At such hearing, LM requests:

"...that the government have available at the hearing (1) Inspector Johnson; (2) the government's expert Robert Arend, referred to at page 4 of Inspector Johnson's affidavit, who testified before Judge Curtin that he had not in fact provided the information quoted both in Inspector Johnson's affidavit and in the affidavit of the Postal Inspector in the Merchant Diamond Group case; and (3) all of the Canadian tapes upon which the government bases its claim that false statements were made by any persons associated with London Merchants, Inc." LM brief, p. 3.

It is apparent that LM's application raises two questions:

(1) Has LM made the requisite threshold showing of falsity which entitles it to a hearing?

(2) If that question be answered in the affirmative, what are the proper bounds of the hearing?

Upon reconsideration, I answer the threshold question in the affirmative. ¶4(c) of the Johnson affidavit recites that the RCMP intercepted in excess of 1000 telephone calls, in which "London Merchants, Inc. salesmen" made alleged misrepresentations to customers. It is now conceded that the telephone calls intercepted by the RCMP involved sales personnel of London House, Toronto, and not LM, New York. The misrepresentation is clearly material within the overall context of the Government's investigation of LM.

In addition, sufficient doubt is cast by Judge Curtin's decision³ upon whether Arend's market opinions were accurate or fully understood to make the threshold showing required for a hearing.

With respect to the proper scope of the hearing, its boundaries are circumscribed by those factors which are decisive

in determining the validity of the search and seizure. The Government points to the continuing discussion in Carmichael, at 988-989, in which the Seventh Circuit considered an affidavit executed (as in the case at bar) by a Government agent on the basis of what others had told him:

"However, once such a hearing is granted, more must be shown to suppress the evidence. Evidence should not be suppressed unless the trial court finds that the government agent was either recklessly or intentionally untruthful. A completely innocent misrepresentation is not sufficient for two reasons. Most importantly, the primary justification for the exclusionary rule is to deter police misconduct (see Kipperman, supra, at 831, and cases cited), and good faith errors cannot be deterred. Furthermore, such errors do not negate probable cause. If an agent reasonably believes facts which on their face indicate that a crime has probably been committed, then even if mistaken, he has probable cause to believe that a crime has been committed. Such errors are likelier and more tolerable during the early stages of the criminal process, for issuance of a warrant is not equivalent to conviction.

"Negligent misrepresentations are theoretically deterrable, but no workable test suggests itself for determining whether an officer was negligent or completely innocent in not checking his facts further. We therefore conclude that evidence should not be suppressed unless the officer was at least reckless in his misrepresentation. Even where the officer is reckless, if the misrepresentation is immaterial, it did not affect the issuance of the warrant and there is no justification for suppressing the evidence." (emphasis added).

The Second Circuit authorities are in accord. In Mapp v. Warden, 531 F.2d 1167 (2d Cir. 1976), a state prisoner challenged the validity of a search warrant based upon a police

officer's warrant, which in turn recited facts furnished by informants. Relying upon evidence adduced at trial, appellate argued that the officer's affidavit contained misrepresentations. The Second Circuit held that probable cause in issuing the warrant was not affected:

"This apparent inconsistency merely challenges the accuracy of the information furnished by the informant. Probable cause is not defeated because an informant may have erred or lied, 'as long as the affiant accurately represented what was told him', Sultan, supra, 463 F.2d at 1070; and there is no evidence that Bergersen misrepresented what he was told." 531 F.2d at 1172-1173.

The Second Circuit quoted and followed Mapp in Kahn v. Flood, 550 F.2d 784, 786 (2d Cir. 1977), in the course of its opinion also citing United States v. Perry, 380 F.2d 396, 398 (2d Cir. 1967), cert. den., 389 U.S. 943, for the proposition that:

"(probable cause established if facts alleged establish illegality if true and affiant has reasonable grounds for believing them true; accuracy of informant's information 'not relevant')."

While LM has relied upon United States v. Gonzalez, 488 F.2d 833, 837-838 (2d Cir. 1973), as suggesting that negligent material statements in an affidavit may require suppression, the Second Circuit was careful to point out in Kahn that Gonzalez and other like cases involved "inaccuracies in statements made by affiants." Kahn at 786 (emphasis in original). In Gonzalez the agent's affidavit purported to describe his own surveillance and

arrest of the defendant. In the case at bar, Inspector Johnson's affidavit relies, as in Mapp and Kahn, upon what he was told by others.

Mapp and Kahn were both state habeas corpus cases. Kahn discusses the possible differences between state and federal law in respect of misstatements in affidavits underlying warrants. The Kahn text, at 785, observes:

"...it is clear that neither jurisdiction would invalidate the warrant without some showing of an affiant's knowing misstatement." (emphasis added).

The Kahn court added a footnote at that point which reads:

"The federal rule might be different with respect to a reckless misstatement by an affiant, but that situation is not involved here." (citing Carmichael; emphasis added).

This Court has some difficulty in reconciling the Kahn text with the footnote, unless "knowing" be regarded as synonymous with "reckless".

In any event, on the readings of Carmichael and the recent pronouncements of the Second Circuit most favorable to LM, it is clear that where a search warrant is based on the affidavit of a law enforcement officer who in turn relies upon information given to him by third parties, a subsequent showing of inaccuracies in that information is not sufficient to negate probable cause. The trial court, to suppress evidence, must be able to find that "the government agent was either recklessly or intentionally untruthful." Carmichael at 988. In the absence

of any authority indicating a different standard, I apply that same standard to the present motion for return of property.

Given that state of the law, the truth or falsity of the information given to Inspector Johnson is not dispositive of the present motion; and LM is not entitled to an evidentiary hearing which primarily addresses that issue. For that reason, I must respectfully differ with the approach taken by Judge Curtin in the Merchant Diamond Group case, supra. The hearing conducted by Judge Curtin, as reflected by his opinion, appears to have focused upon the truth or falsity of the information given to a postal inspector in connection with a comparable affidavit underlying a search warrant. Judge Curtin concluded:

"It [the moving party] succeeded in establishing a number of material inaccuracies in the postal inspector's affidavit, thus shifting the burden back to the Government. Without the ability to review the RCMP tape, I cannot find sufficient basis to refute the petitioner's evidence and to establish probable cause of MDG's fraud upon customers in the United States." Slip Opinion at 13-14.

For that reason, Judge Curtin ordered the return of the property seized. One searches in vain throughout Judge Curtin's opinion for any discussion of whether, assuming the inaccuracy of certain information set forth in the inspector's affidavit, the affiant, in promulgating such information, was innocent or at worst negligent on the one hand, or intentionally or at best recklessly untruthful on the other hand. However, it is the latter inquiry which is decisive under governing law, and which alone must be addressed in any subsequent hearing.

It is perhaps easier to recite the applicable standard in principle than to implement it in an evidentiary hearing. That is to say, the innocence, recklessness, or knowing untruthfulness of the Government agent-affiant cannot be considered in a vacuum; the falsity of the information he is imparting obviously is related to the proper characterization (innocent, reckless, or knowingly untruthful) of the manner in which that information is imparted. However, for the reasons stated, the primary purpose of such a hearing is not, and cannot be, the determination of the truth or falsity of the underlying information.

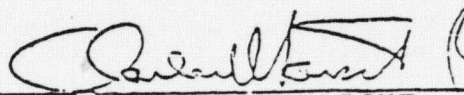
In these circumstances, the Court concludes that Postal Inspector Johnson must be made available for examination by LM. However, the Government will not be required to produce any other witnesses or material in connection with that initial hearing. At the examination of Inspector Johnson, the falsities in his affidavit of which LM complains may be assumed; the proper inquiry to Inspector Johnson will focus upon the manner in which he received, evaluated and set forth the information underlying his affidavit. At the conclusion of Inspector Johnson's examination, the Court may be in a position to conclude that any inaccuracies in his affidavit were uncomplicated by personal recklessness or mendacity on the part of Inspector Johnson. Such a finding, if supported by the evidence, would be dispositive of the present motion, under the authorities cited supra. On the other hand, examination of Mr. Johnson may give rise to the necessity for further inquiry, in which event the Court, after hearing counsel, will enter an appropriate further order.

CONCLUSION

The Court's opinion and order of July 29, 1977 is vacated. The Government will produce Inspector Johnson for examination by counsel for LM on October 13, 1977, in Courtroom 36, at 4:00 p.m.

It is So Ordered.

Dated: New York, New York
September 30, 1977



CHARLES S. HAIGHT, JR.
U. S. D. J.

Footnotes

1. "Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12."
2. I do not mean to suggest that LM will be indicted, but only to indicate that no indictment is presently pending.
3. See especially Slip Opinion at 10-11.



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number
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October 14, 1977

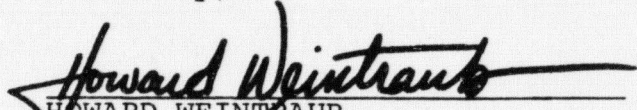
Honorable A. Daniel Fusaro, Clerk
United States Court of Appeals
For the Second Circuit
New York, New York 10007

Re: United States v. Merchant Diamond Group, Inc.
No. 77-1278

Dear Mr. Fusaro:

Enclosed please find 10 copies of the Reply Brief
for the United States, Appellant, in the above-captioned
case for filing. Copies have this day been sent to
counsel of record. A Certificate of Service is attached.

Sincerely,


HOWARD WEINTRAUB
Attorney for the United States
Department of Justice
Washington, D.C. 20530

cc: Warren S. Radler, Esquire
Saperston, Day & Radler
Liberty Bank Building
Buffalo, New York 14202



